No. 78833-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAY COLBERT, as Personal Representative of the Estate of DENISE COLBERT; and for himself,

Plaintiff/Petitioner,

vs.

MOOMBA SPORTS, INC., a Tennessee corporation; UNITED MARINE CORPORATION OF TENNESSEE, a Tennessee corporation; AMERICAN MARINE CORPORATION, a Tennessee corporation; SKIER'S CHOICE, INC., an Oklahoma corporation; and MARC JACOBI,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

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On Behalf of
Washington State Trial Lawyers Association Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress in the civil justice system, including the rights of persons seeking to recover for negligent infliction of emotional distress.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the parameters of liability for the tort of negligent inflection of emotional distress (or NIED). The Court of Appeals strictly construed the elements for this cause of action, affirming dismissal on summary judgment of a claim arising from a father witnessing events at the scene of his daughter's drowning. In so doing, it imported restrictive requirements from other states that are inconsistent with Washington law, and upheld summary judgment in the face of disputed issues of material fact. This Court should reaffirm the proper scope of the tort of NIED, and remand this matter for trial.

Background Facts

For purposes of this amicus curiae brief, the underlying facts are drawn from the published Court of Appeals opinion and the briefing of the parties. See Colbert v. Moomba Sports, Inc., 132 Wn.App. 916, 135 P.3d

485 (2006), *review granted*, ___ Wn.2d ___ (2007); Colbert Br. at 2-11; SC Br. at 1-10; Colbert Pet. for Rev. at 1-6; SC Ans. to Pet. for Rev. at 1-2; Colbert Supp Br. at 2-5; SC Supp. Br. at 1-3.

Denise Colbert drowned in a lake after inhaling carbon monoxide while hanging onto the rear of a motorboat, and attempting to swim to shore. Her father, Jay Colbert (Colbert) was notified shortly after she disappeared under the water that she was missing in the lake, and he immediately drove to the scene, approximately five minutes away. From his vantage point on a friend's dock, Colbert witnessed search and rescue efforts for several hours, and received periodic updates from a police chaplain. He saw as the search was narrowed to a specific area, approximately 100 yards from the dock, and a buoy popped up. He could hear the dialogue between the rescue workers and knew what the buoy meant – it was tied to Denise's body. See Colbert Br. at 7. The chaplain told Colbert that Denise's body had been recovered, and Colbert observed as her body was pulled out of the water, wrapped in a blanket and placed in an ambulance.

Procedural Facts

Colbert brought a tort action for, *inter alia*, negligent infliction of emotional distress (NIED) against Moomba Sports, Inc., United Marine Corporation of Tennessee, American Marine Corporation, Skier's Choice, Inc. and Marc Jacobi (collectively referred to as Skier's Choice or SC). Colbert presented evidence, including testimony of a psychologist,

Dr. Erving Severtson, that he suffered significant emotional distress because of what he witnessed at the scene of Denise's drowning. 132 Wn.App. at 921. Skier's Choice sought summary judgment dismissal of the NIED claim, arguing that Colbert was not a "foreseeable" plaintiff because he did not witness his daughter's drowning, observed only search and rescue operations, and did not see his daughter's body until after she had been dead for some time. See Colbert, 132 Wn. App. at 923.

The superior court granted summary judgment, and, after voluntarily dismissing the remaining claims, Colbert appealed. See id. at 922. The Court of Appeals affirmed dismissal of Colbert's NIED claim, concluding that Washington law does not recognize the tort of NIED where the plaintiff witnesses rescue efforts at the scene of an accident, but does not directly observe the suffering of a loved one. Id. at 934. Grafting the rationale from out-of-state cases onto Washington law, the appellate court concluded that proof of a NIED claim requires that the plaintiff either witness the accident or its effect on a loved one, in the immediate aftermath of the accident and before third parties such as rescuers or paramedics arrive. Id. at 931. The court further suggested that the plaintiff must arrive "unwittingly" at the accident scene, and that Colbert's view of the scene from 100 yards away was "clearly too great" to allow recovery. Id. at 934 n.12, 935.

Finally, the Court of Appeals concluded that, even had Colbert's NIED claim survived summary judgment under its analysis, dismissal was

still appropriate because Colbert could not prove that his emotional distress was caused or worsened by seeing his daughter's body at the accident scene. Id. at 932-33.

Colbert sought review by this Court, which was granted.

III. ISSUES PRESENTED

1. What are the parameters of the tort of negligent infliction of emotional distress in Washington?

2. Did the Court of Appeals properly analyze the proof requirements for negligent infliction of emotional distress, in dismissing this claim on summary judgment for want of a triable issue of fact?

IV. SUMMARY OF ARGUMENT

The tort of NIED recognizes that emotional distress suffered by a family member who views an accident or its immediate aftermath is qualitatively different from learning second-hand of a loved one's injury or death. Through a series of cases, this Court has defined the general parameters of NIED to reflect this distinction, allowing recovery based on a family member's direct experience of a horrendous event, without extending a defendant's liability to everyone who grieves for the victim. These general parameters require proof that the plaintiff be a family member who was present at the scene of the accident or arrived "shortly thereafter," before substantial change in the condition or location of the victim. Emotional distress must be caused by witnessing the event, and supported by objective symptomatology. No other rigid temporal or spatial limitations on recovery for NIED have been imposed.

The Court of Appeals' analysis in this case departs from this Court's carefully balanced approach. Grafting onto Washington law bright-line requirements imposed by other states, the lower court found it dispositive that Colbert did not see his daughter disappear beneath the surface of the lake, and saw her body only briefly from 100 yards away after the hours-long search and rescue effort. It concluded that Colbert did not, as a matter of law, arrive at the accident scene "shortly thereafter," because he did not witness the effects of the accident on his daughter or arrive before rescue workers became involved, and further did not arrive "unwittingly" at the scene.

None of the proof requirements imposed by the Court of Appeals serves to distinguish emotional distress caused by the horror of an accident scene from the grief that all may be expected to endure in learning of a loved one's injury or death. Rather, these arbitrary limits disregard the unique circumstances of an accident such as a drowning or a fire, where a jury may find emotional distress caused by witnessing search and rescue efforts part of the immediate aftermath of the accident, notwithstanding the view of the loved one's body is obscured by a veil of water or a wall of flames. As in other contexts, whether the plaintiff arrived at the scene of an accident "shortly thereafter," and whether he suffered emotional distress as a result, are properly questions for the jury. In answering these questions as a matter of law, the Court of Appeals encroached on the fact-finder's essential role in deciding liability for NIED.

V. ARGUMENT

A. The Court of Appeals Erroneously Imposed Rigid Proof Requirements For The Tort Of NIED That Are Inconsistent With This Court's Jurisprudence.

The tort of NIED is a specie of ordinary negligence law, the development of which has divided courts across the country and produced a varied and confused history. See Hunsley v. Giard, 87 Wn.2d 424, 427-31, 553 P.2d 1096 (1976). The Court of Appeals in this case strayed from the development of this tort in Washington, erroneously importing out-of-state temporal and spatial requirements that disrupt the balance this Court has maintained between compensating injured victims and protecting defendants from unlimited liability.

1. Development Of Liability For NIED In Washington.

Washington law recognizing recovery for NIED is traceable to Hunsley v. Giard, which abandoned earlier limitations on so-called bystander recovery, including that the plaintiff be within the "zone of danger" of the defendant's negligence. See 87 Wn.2d at 433-35. It held instead that NIED claims should be evaluated based on "traditional principles, theories, and standards of tort law." Id. at 434. In particular, it recognized a defendant's liability for negligence extends to family members of a victim who foreseeably suffer emotional distress as a result, with the further limitation that such emotional distress must be proved by objective symptomatology. Id. at 433-37. The Court refused to draw any "absolute boundary" on liability. Id. at 436.

In Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 962, 577 P.2d 580 (1978), the Court reiterated its analysis in Hunsley, emphazing that "the confines of a defendant's liability are now measured by the strictures imposed by negligence theory, i.e., foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger." In so doing, it recognized a triable claim of NIED arising from a funeral home's mishandling of the plaintiff's son's cremated remains. The plaintiff had not witnessed the negligent act, but experienced trauma when she sifted through what she believed was packing material in a box containing an urn, and realized that the material was her son's ashes. Id. at 960.

The Court of Appeals subsequently expressed dissatisfaction with the Hunsley analysis based largely on factual foreseeability, noting that policy considerations dictate that there should be some additional limits to a defendant's liability. See Cunningham v. Lockard, 48 Wn. App. 38, 736 P.2d 305 (1987). Looking to notions of "legal cause" for such limits, the court adopted a rule restricting recovery for NIED to family members who were *present* at the time the victim was imperiled by the defendant's negligence. Id., 48 Wn. App. at 44.

This Court expressly rejected the Court of Appeals "presence" requirement, in both Gain v. Carroll Mill Co., 114 Wn.2d 254, 256, 260, 787 P.2d 553 (1990), and Hegel v. McMahon, 136 Wn.2d 122, 128-32, 960 P.2d 424 (1998). In Gain, the Court acknowledged the Court of

Appeals' concern in Cunningham, that reasonable limits must be placed on the scope of a defendant's liability for purely emotional distress. See Gain, 114 Wn.2d at 260. Rather than endorsing the "presence" requirement, however, it adopted the now well-recognized analysis limiting recovery to family members who are "physically present at the scene of the accident or arrive shortly thereafter." Id. at 261. In so holding, the Court stated, somewhat imprecisely: "We conclude that mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law." Id. at 260.[1] The Court in Gain had no reason to define the meaning of "shortly thereafter," because the plaintiffs in that case were not present at the accident scene at any point, having only heard about the accident on the television news. See id. at 255.

In Hegel, the Court returned to the meaning of "shortly thereafter," in two consolidated cases in which family members came upon the scene of an automobile accident and witnessed their injured loved one's suffering. See 136 Wn.2d at 124-25. It again considered the "presence" requirement of Cunningham, and again rejected this limitation. See id. at 128-30.[2] Instead, the Court sought to articulate an organizing principle for determining when liability for NIED will be imposed, noting:

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[1] As discussed below, the Court was using "foreseeability" not in a factual sense here, but as a policy-based limitation on the imposition of a duty. See infra, §B.1 at 16-17.

[2] Given this Court's express rejection of the Court of Appeals' formulation in Cunningham, it is bewildering that the court below concludes this Court "approved and incorporated our Cunningham NIED rationale." Colbert, 132 Wn. App. at 927. Colbert urges this Court to expressly overrule Cunningham. See Colbert Supp. Br. at 10 n.7. WSTLA Foundation believes it has already done so, in Gain and Hegel.

> The challenge is to create a rule that acknowledges the shock of seeing a victim shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim.

Id. at 131. The Court maintained what it described as a "principled intermediate approach," id., limiting recovery to family members "who are present at the scene before the horror of the accident has abated," id. at 132. Consistent with the analysis in Hunsley, the Court recognized that the factual foreseeability of emotional distress to the family members could not be determined as a matter of law. Id. at 132.

Throughout this Court's development of the law allowing recovery for NIED, it has defined the general parameters of the tort, but otherwise resisted bright-line rules with respect to temporal or spatial requirements. See Hunsley at 435-37; Corrigal at 962; Gain at 257, 260; Hegel at 129-32; accord Green v. Young, 113 Wn. App. 746, 752, 54 P.3d 734 (2002) (following analysis of Hegel in rejecting bright-line rule for recovery for emotional injuries in underinsured motorist context). It has done so in recognition that, as in other areas of negligence law, liability principles in this context involve "balancing the interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences." Hunsley at 435; see also Gain at 260; Hegel at 131-32.

This Court has struck an appropriate balance, in limiting the class of potential plaintiffs to family members, and isolating the nature of the emotional distress for which recovery is allowed by requiring that the

plaintiff be present at the accident scene or arrive shortly thereafter. It has further protected against fraudulent or insubstantial claims by requiring proof of emotional distress by medical evidence and objective symptomatology.[3] As will be shown below, the Court of Appeals analysis in this case strays from this Court's carefully balanced approach, erroneously imposing rigid proof requirements that do not meaningfully differentiate between valid and invalid NIED claims.

2. The Out-Of-State Proof Requirements The Court Of Appeals Grafted Onto Washington Law Unduly Restrict Recovery For NIED.

The Court of Appeals admittedly "grafted" onto Washington law specific elements of proof for a NIED claim derived from New Mexico law, and also looked to out-of-state cases in construing the phrase, "shortly thereafter." See Colbert at 931; id. at 929-35; see e.g. Gabaldon v. Jay-Bi Prop. Mgmt., Inc., 925 P.2d 510 (N.M. 1996) (imposing "contemporaneous sensory perception" requirement, that plaintiff observe injured person's suffering before emergency personnel arrive). Such bright-line proof requirements are inconsistent with this Court's jurisprudence.

"Contemporaneous Sensory Perception" Requirement.

As described by the Court of Appeals, New Mexico law requires a plaintiff to witness the scene of an accident before emergency personnel

[3] The Wyoming Supreme Court in Gates v. Richardson, 719 P.2d 193, 200 (Wyo. 1986), observed that the objective symptomatology requirement reflects the balance in Washington law, as Hunsley otherwise rejected rigid duty restrictions on NIED claims.

arrive in order to recover for NIED. See Colbert at 930-31; Gabaldon, 925 P.2d at 514. This requirement is intended to differentiate between the emotional impact of the accident itself "rather than the impact from seeing emergency professionals attending the victim." Colbert at 931; Gabaldon at 514.

The presence of emergency personnel may *sometimes* be an appropriate factor for the jury to consider in deciding whether the plaintiff's emotional distress arises from witnessing the immediate aftermath of an accident. However, it should not preclude recovery for NIED as a matter of law. As this case illustrates, an accident such as a drowning does not involve the type of sudden, traumatic event that this proof requirement anticipates – and which New Mexico law requires.[4]

When a family member is present at the scene where a loved one has disappeared under the water, the first-hand traumatic experience will typically involve watching the search and rescue efforts. Such efforts do not necessarily alter the aftermath of the accident, but may be part of its horror, as the family member is unable to see the loved one for whom he fears. This situation is comparable to the trauma of watching a burning building and knowing that a loved one is trapped inside. See e.g. Zuniga v. Housing Auth. of City of L.A., 41 Cal. App. 4th 82 (1996) (recognizing

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This Court referenced Gates in both Gain, 114 Wn.2d at 260, and Hegel, 136 Wn.2d at 130.

[4] Subsequent to Gabaldon, New Mexico restricted NIED claims to sudden, traumatic events, imposing an additional bright-line limitation. See Fernandez v. Walgreen Hastings Co., 968 P.2d 774 (N.M. 1998); see also Lauren Keefe, Note, Tort Law- New Mexico Limits Recovery of Negligent Infliction of Emotional Distress to Sudden Traumatic Accidents – Fernandez v. Walgreen Hastings Co., 30 N.M. L.Rev. 363 (2000).

NIED claims based on witnessing emergency personnel's futile efforts to rescue arson victims, and subsequent recovery of victims' bodies). The Court of Appeals misconceives the horror of a drowning accident when it narrowly defines the accident scene as "the bottom of the lake." Colbert at 934.

Imposing a bright-line requirement that the plaintiff must beat emergency personnel to the accident scene serves no useful purpose in distinguishing valid from invalid NIED claims. It is inconsistent with Washington law, which unlike New Mexico law, does not limit recovery for NIED to emotional distress caused by witnessing a sudden, traumatic accident. Compare Fernandez, 968 P.2d at 779, and Hegel at 132 (noting recovery allowed where family member is present at the scene "before the horror of the accident has abated.") In the context of a drowning accident, a jury could find that the horror of the accident includes witnessing an ultimately futile search and rescue effort following the victim's disappearance under the water.

Requirement that the Plaintiff Directly View the Victim.

The Court of Appeals also found it dispositive that Colbert did not witness his daughter suffering because she had disappeared in the lake. See Colbert at 934 (stating, "although Colbert arrived at the scene of the accident shortly after (around 10 minutes) it occurred, he did not see or hear his daughter drown. Nor did he see her upon his arrival."). SC similarly argues that Colbert "did not and cannot demonstrate that the act

of seeing his daughter's body taken from the water – as distinguished from watching the recovery effort – was the proximate cause of his emotional disorders." SC Br. at 29.

This suggests a rigid requirement that a plaintiff who is present at an accident scene be able to see the loved one for whom he fears, regardless of the circumstances at the scene that make this impossible. Certainly, a drowning accident is unlikely to afford a watching family member a direct view of the victim's suffering, but the Court of Appeals does not explain how this makes the horror of the accident less palpable. Rather, the court derives this requirement from the factual circumstances of other cases, including Hegel (and its companion case, Marzolf). See Colbert at 934-35. It further relies on a passage from Gabaldon, which merely distinguishes the experience of witnessing an accident or its aftermath from "'learning of the family member's death through indirect means ....'" 925 P.2d at 514 (quoting Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 444-45 (Wis. 1994)); see Colbert at 933. This does not support the Court of Appeals imposition of a bright-line rule, disallowing recovery for NIED where the plaintiff did not have an actual view of the victim.

Such a rule makes little sense. A family member present at the scene of an accident may not be able to see the victim for any number of reasons. As in this case, her body may be obscured by water, or similarly, she may be inside a burning building or automobile. Emergency

personnel may restrict the plaintiff's access. In such circumstances, a jury may still determine that the plaintiff experienced the immediate aftermath of the accident and its effect on the victim, producing a trauma that is distinct from the grief that attends learning second-hand of a loved one's injury or death. Drawing this distinction should remain the focus in identifying the parameters of a NIED claim, without a need for rigid temporal or spatial proof requirements.

Requirement that the Plaintiff Arrive "Unwittingly."

Lastly, the Court of Appeals rejected Colbert's NIED claim because he did not arrive "unwittingly" at the scene of his daughter's drowning. See Colbert at 935. It noted that other states have required this in order to allow recovery, and that the plaintiffs in Hegel "happened upon" the accident scenes involving their loved ones. Id. at 935.

The particular circumstances of Hegel or other cases may have involved a family member who arrived unwittingly, but the Court of Appeals offers no reason why this is significant to a NIED claim. This Court should reject such an arbitrary requirement, again retaining the proper focus on whether the plaintiff's experience involves the horror of the accident and its immediate aftermath. See Hegel at 131-32.

The rigid proof requirements imposed by the Court of Appeals are not helpful in drawing the distinction between valid and invalid NIED claims. They fail to appreciate the unique nature of a drowning accident, as opposed to a sudden, traumatic event, and are inconsistent with this

Court's analysis, which has rejected bright-line rules. This Court should reaffirm its precedent.

B. The Jury Must Determine Liability For NIED Where There Are Genuine Issues Of Material Fact Whether The Plaintiff Arrived At The Scene of An Accident "Shortly Thereafter," And Whether His Emotional Distress Was Caused Or Worsened By This Experience.

In addition to imposing specific proof requirements for NIED not required by this Court's precedent, the Court of Appeals below seems to have misapprehended the court's role in adjudicating these claims, versus that of the jury. See Colbert at 926-27 & n.7. In particular, it resolved fact-intensive questions as to whether Colbert arrived soon enough after the accident, or was close enough to the scene to observe events. It also determined that his emotional distress, though manifested by objective symptomatology, was no worse than it would have been upon learning second-hand of his daughter's death. Resolution of these questions properly belongs to the jury.

1. The Court of Appeals Analysis Erodes the Jury's Function by Collapsing The Legal And Factual Elements Of A NIED Claim.

Under a "foreseeability" analysis, the Court of Appeals described the jury's role in a NIED claim as limited to resolving certain "foundational facts," such as when the plaintiff arrived at the accident scene, concluding that otherwise in NIED claims "foreseeability is usually determined by courts as a matter of law." Id. n.7. This view seems to

suggest, for example, that in every case the court determines as a matter of law whether the "shortly thereafter" component is met.

This approach is inconsistent with this Court's jurisprudence. In fairness to the Court of Appeals, its confusion as to the proper analysis of "foreseeability" may have derived from imprecise language in Gain describing certain claims as "unforeseeable as a matter of law." Gain at 260; see also Hegel at 132. However, neither Gain nor Hegel should be read as depriving the jury of its fact-finding role in resolving NIED claims. While it is true that foreseeability analysis in NIED claims has evolved from the Hunsley pure "factual foreseeability" approach, the analysis in Gain and later Hegel is consistent with Hunsely in refusing to place bright-line limitations on temporal or spatial aspects of a NIED claim, bearing on whether the plaintiff arrived at the scene of an accident "shortly thereafter," or was close enough to witness the events.

The Court in Gain appears to use "foreseeability" in reference to the *policy-based assessment* of the limits of the legal consequences of a negligent act. See Gain at 258-60; id. at 263-65 (Brachtenbach, J., concurring in result, dissenting; discussing majority's foreseeability analysis); see also Hegel at 127-28. In negligence law, the term "foreseeability" may be used to express different concepts. See generally Mark P. Gergen, The Jury's Role in Deciding Normative Issues in the American Common Law, 68 Fordham L.Rev. 407, 424-39 (1999). "Factual foreseeability" serves to define the scope of the defendant's duty

in the particular case. See Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 475-78, 951 P.2d 749 (1998). It generally presents a question of fact for the jury. See id., 134 Wn.2d at 477; accord Crowe v. Gaston, 134 Wn.2d 509, 517-18, 951 P.2d 1118 (1998).

A different notion of "foreseeability" relates to whether, from a policy standpoint, liability should be imposed for particular consequences of the defendant's conduct, or whether the harm is deemed too remote or insubstantial as a matter of law. See Schooley at 475-80; Gergen, supra at 429-30 (discussing "no duty" rules by which courts take the evaluation of certain conduct away from the jury); see e.g. Gain at 258-59; Hegel at 128. This concept pertains to the question of whether a duty should be imposed in the first instance, or to "legal cause." See Schooley at 480; cf. Cunningham at 43-45 (evaluating limits on NIED recovery in terms of "legal causation" requirement).

For the Court of Appeals to conclude that the NIED claim here may not proceed because the timeframe before Colbert arrived at the scene was too long, or he observed the events from too great a distance, strays from this Court's teachings and usurps the jury function. As noted in Hegel:

> An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured.

136 Wn.2d at 131 (footnote omitted). Where the plaintiff establishes a prima facie case, insofar as having arrived at the scene of an accident

"shortly thereafter," then it should be for the jury to decide whether recovery is warranted under the particular circumstances.

2. The Court Of Appeals Analysis Of The Factual Elements Of Colbert's Claim Reflects Insufficient Respect For The Jury's Role.

A separate aspect of the Court of Appeals' analysis encroaches on the jury's prerogative to decide the facts. Contrary to the established summary judgment standard of review, the Court of Appeals appears to overlook reasonable inferences from the facts that would require a trial on Colbert's NIED claim. See generally CR 56. Two aspects of the opinion illustrate this.

First, the Court of Appeals concludes as a matter of law that Colbert's position some 100 yards away from where his daughter's body was recovered was "clearly too great" to support a claim of NIED. See Colbert at 933 & n.11- 934 n.12. Yet, Colbert's briefing identifies evidence that he could observe the rescue efforts from his vantage point, and hear the dialogue between the rescue workers. See Colbert Br. at 7 (citing CP 433). It was at the point he saw the buoy pop up that he knew his daughter was dead. Id. (citing CP 469). He saw her body being pulled over the side of the boat by her arm, and could see the rescue workers moving her body in the boat, putting a sheet over her, and taking her away in an ambulance. Id. at 8 (citing CP 433, 469). He offered evidence that the lighting conditions at the time were sufficient to allow him to view this activity from the dock. Id. at 7-8 (citing CP 452). The Court of Appeals

failed to give full import to these facts and all reasonable inferences when it concluded that no reasonable jury could find that Colbert was in a sufficient position to witness the immediate aftermath of the drowning. See Colbert at 934. The Court's description of the facts in its opinion suggests an encroachment on the jury's prerogative to evaluate the evidence. For example:

> [W]hen Colbert finally saw the body, he saw it only from a distance, after rescuers had pulled it from its hidden location at the bottom of the lake. (...) And when [Colbert] did see her body, it was only briefly, from a distance, after rescuers had substantially changed her location, removed her body from the accident scene (the bottom of the lake), and wrapped the body in a blanket.

See id. (footnote omitted). This description reflects a particular characterization of the evidence, generally unfavorable to the non-moving party, and with which a reasonable jury could disagree.

Second, the Court of Appeals concludes that Colbert's medical testimony does not establish that his emotional distress was caused or worsened by his experience of witnessing the immediate aftermath of his daughter's drowning, but would have been the same had he not seen her body. See Colbert at 932-33. Setting aside the court's error in requiring that a plaintiff actually see the body of a loved one at the scene of a drowning in order to recover for NIED, addressed supra, §A.2 at 12-14, its conclusion as to the import of Dr. Severtson's testimony is debatable. As the Court of Appeals acknowledges, Dr. Severtson testified that Colbert's experience at the accident scene, which included seeing his daughter's body recovered, directly caused or markedly exacerbated his emotional

distress. See id. at 921 & n.3; see also Colbert Supp. Br. at 4, 17 (citing CP 473, 499, 502). Even the portion of Dr. Severtson's testimony set forth in the Court of Appeals opinion includes the statement: "Seeing it makes it worse." Colbert at 921 n.3 (quoting CP 496). Allowing all favorable inferences from this testimony, a jury should determine whether Colbert meets the distress-causation element of a NIED claim.[5]

The Court of Appeals' failure to credit the evidence and all favorable inferences in support of Colbert's claim is troubling, because it reflects the ease with which an appellate court may conclude that reasonable minds cannot differ. This "gate-keeping" aspect of summary judgment procedure must be closely scrutinized by this Court, to protect the constitutional role of the jury to decide the facts of a case.

VI. CONCLUSION

The Court should adopt the reasoning advanced in this brief and resolve this appeal accordingly.

DATED this 16th day of April, 2007.

FILED AS ATTACHMENT TO E-MAIL

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DEBRA L. STEPHENS BRYAN P. HARNETIAUX

On Behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

[5] In its opening brief, SC argued that Colbert failed to present adequate medical testimony to meet the "objective symptomatology" requirement. See SC Br. at 26-28; see also SC Ans. to Pet. for Rev. at 18. The Court of Appeals opinion does not address this argument. See Colbert at 932-33 (addressing emotional distress proof requirement in terms of "distress-causation element," rather than adequacy of medical testimony). SC does not make any argument relating to the adequacy of Colbert's evidence in its supplemental brief, referring only to the Court of Appeals' holding on the distress-causation element. See SC Supp. Br. at 6 n.5.